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Supreme Court, U.S.
FILED
APR 12 1996
CLERK

No. 95-1491

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

D.F.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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31 pp

QUESTION PRESENTED

On direct appeal in a federal prosecution, did the court of appeals correctly use a clear error standard in reviewing the district court's finding that respondent's statements were involuntary?

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

D.F., by counsel of record, Dean A. Strang, Shellow, Shellow & Glynn, S.C., now responds to the United States' petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in this federal juvenile delinquency action. Respondent agrees that this case merits review, but disagrees that summary disposition is appropriate.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in full relevant part, "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . "

STATEMENT OF THE CASE

This "highly fact-specific case," as the court of appeals called it, App. 31a at n.20,[1] arises from the Eastern District of Wisconsin, where respondent was charged as a juvenile delinquent with two second-degree murders on an Indian reservation. 18 U.S.C. §§ 1111, 1153, 5031; App. 2a.

[1] D.F. refers here to the appendix to the United States' petition for a writ of certiorari, which is adequate for respondent's purposes. This brief in opposition includes no appendix of its own.

Respondent suffered from extensive physical abuse, sexual abuse, and drug and alcohol abuse all before she was thirteen years old. App. 36a. By then, she also had a history of running away and of assaulting others. *Ibid.* She had lived with five different legal guardians, and considered a sixth. *Ibid.*

In January 1992, when respondent was a twelve-year old girl, two young cousins died within six days in the home that she shared with others. App. 2a. Pathologists attributed the deaths to natural causes. App. 34a, 71a.

Come December 1992, respondent was admitted against her will, App. 2a, to a locked adolescent ward of a county mental health center, where "freedom of movement while on the ward was restricted severely." App. 3a. There, after nearly three months of conflicting advice about confidentiality from the Center's staff, App. 38a-40a, 44a, 68a-69a, a Center social worker promised respondent that she would not be prosecuted for past admissions of assaulting younger children, provided that she continued to follow treatment expectations and to make progress in treatment. App. 6a, 42a. Following treatment expectations meant participating sincerely in therapy sessions. App. 42a. The district court found that this promise "sent two very clear messages [to respondent]: (1) D.F.'s frank disclosure of her past behavior would be generously rewarded, and (2) she would likely be granted leniency on any future disclosures." App. 42a.

Suspecting that she had murdered her two cousins, App. 43a, Center staff worked in many ways to encourage respondent to admit past assaults of young children. App. 4a-6a, 41a-42a. They used a system of privileges and

punishment that rewarded patients for talking and writing about problems, App. 4a, and staff members encouraged respondent to develop trust in them and to speak openly about physical harm she had caused other children. App. 5a. Staff asked respondent directly whether she ever had murdered anyone. App. 39a, 41a. Psychotropic medications also were administered to respondent. App. 4a.

Some Center staff members viewed the prosecution of respondent as part of their work. App. 30a-31a; App. 43a, 67a. "Staff members at the Center," said the district court, "were either enlisted or volunteered to act as law enforcement surrogates in eliciting confessions from troubled teens." App. 67a. The court of appeals accepted that conclusion, recognizing that in reaching it, the district court was "[d]ealing with conflicting evidence and, necessarily, with the credibility of witnesses." App. 30a.

After some four months spent confined in the Center, respondent first claimed that she had killed her cousins. App. 8a. Staff reported that admission the next day to child protective services, and soon the FBI began an investigation. App. 45a. Although staff decided to cooperate with the FBI, they never told respondent. App. 7a, 47a. Instead, a therapist encouraged respondent to repeat her admissions, telling her falsely that therapy sessions were "confidential." App. 47a-48a. That therapist made the same claim to respondent's appointed lawyer, after respondent signed a written invocation of her Fifth Amendment rights in the presence of the lawyer and the therapist. App. 46a-47a. Eventually, the district court

found, respondent made eleven[2] incriminating statements in response to constant staff encouragement, even "pressure[ ]," to repeat and expand upon her statement. App. 48a, 69a. At least two of those statements came in response to staff questioning after respondent had signed the invocation of Fifth Amendment rights. App. 15a at n.9; App. 47a-48a.

During this time, with the secondary motive of refreshing her recollection for later testimony, App. 7a at n.6, respondent's primary therapist typed home computer memoranda that included exact recountings of respondent's statements, often in quotation marks. *Ibid.* The district court found that one of these notes included direct quotes from respondent "[p]artially out of a concern that [the therapist] might be asked by law enforcement exactly what D.F. had said." App. 48a.

Respondent's statements in hand, the government charged her after a new pathologist opined that the two young cousins could have died of suffocation. App. 2a, 71a. Following a two-day suppression hearing, App. 1a, a magistrate judge recommended exclusion of all statements on grounds not argued; his recommendation is not at issue here. App. 78a-90a. The district court agreed that the statements all should be suppressed, but for the different reason (which D.F. did advance) that the government had not proven them voluntary as the due process clause of the Fifth Amendment requires. App. 63a-69a.

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[2] The court of appeals gave that sum, App. 8a; the district court simply said that respondent "made incriminating statements on a number of other occasions." App. 48a.

Both the district judge and the magistrate judge made extensive findings of fact. App. 36a-48a, 72a-77a. The district judge looked to the parties' agreed statements of facts, the magistrate judge's findings, and the hearing transcript in deciding the facts *de novo* except where the magistrate judge's findings depended upon credibility determinations. App. 36a at n.2. The district judge's ruling rested on respondent's subjective qualities, and on the subjective effect of state actors' conduct: D.F. was "a deeply disturbed girl of 13;" she mistrusted authority figures; staff "went to great lengths to encourage and develop her trust;" and respondent "resisted this 'encouragement' " for four months, even though privileges turned in part on "frank admission of crimes." App. 68a. In the end the district judge held, "After considering the totality of the circumstances, I conclude that D.F.'s inculpatory statements were secured through psychological coercion and were not the 'product of a rational intellect and free will.' * * * A reasonable person of D.F.'s age, intellect, and mental state would have felt coerced." App. 69a.

On the United States' appeal, the court of appeals affirmed. That court recognized that it had to "assess the district court's understanding of any applicable substantive legal standard on a de novo basis." App. 12a. Facts, on the other hand, the court of appeals would review under a clearly erroneous standard. *Ibid.* Finally, "the voluntariness of a confession is assessed on appeal under the clear error standard of review," the court of appeals wrote, relying on its decision one month earlier in *United States v. Baldwin*, 60 F.3d 363 (7th Cir. 1995). Much of the court of appeals' analysis was devoted to deciding

independently whether the district court correctly read *Colorado v. Connelly*, 479 U.S. 157 (1986). App. 18a-30a.

Later, no judge in active service on the court of appeals requested a vote on the United States' petition for rehearing and suggestion for rehearing *en banc*, and the original panel voted unanimously to deny rehearing. App. 93a-94a. The United States now asks this Court not just to grant a writ of certiorari, but to reverse summarily.

REASONS FOR CONSIDERING THE WRIT

Respondent agrees that there are good reasons for the Court to hear this case. Although the court of appeals' decision was not "contrary to a long line of decisions of this Court" as the United States argues, Petition for a Writ of Certiorari at 12, it probably did create an eleven to one split in the circuits.[3] The issue has broad importance to the federal courts of appeals, and a uniform standard of

[3] *See* Petition for a Writ of Certiorari at 20-21 (citing cases). Respondent says "probably" only because the Eleventh Circuit at least twice has given the voluntariness of a confession clear error review, tracing that standard back to Fifth Circuit precedent. *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1475 (11th Cir.), *cert. denied*, 506 U.S. 964 (1992), citing *United States v. Vera*, 701 F.2d 1349, 1364 (11th Cir. 1983), in turn citing *United States v. Watson*, 591 F.2d 1058, 1061 (5th Cir.), *cert. denied*, 441 U.S. 965 (1979), which relied upon *United States v. Greer*, 566 F.2d 472, 472-74 (5th Cir.), *cert. denied*, 435 U.S. 1009 (1978). *Greer* was a per curiam opinion holding that the clear error standard applied to a district court's finding that a confession was not the product of defendant's unlawful arrest. As the United States notes, both the Eleventh and the Fifth Circuits on other occasions have applied a *de novo* standard.

review would be best for all litigants in federal criminal cases. Finally, while it is not clear that the standard of review determined the outcome in the court of appeals, neither did that court say that its decision would have been the same under the *de novo* standard.

Those reasons support certiorari.

But respondent disagrees with the suggestion that summary disposition would be right. For three reasons, this case merits plenary review if it is worthy of review at all. First, the United States overlooks important distinctions between the general role of federal courts in reviewing state courts' adherence to constitutional requirements when habeas jurisdiction properly is invoked, on the one hand, and the assignment of duties within the hierarchy of federal courts themselves in federal prosecutions, on the other hand. The decision in *Miller v. Fenton*, 474 U.S. 104 (1985), speaks directly to the former but not to the latter.

Second, unlike this case, both of the cases this term that address related standard of review issues[4] concern objective measurement in the final analysis: "custody" for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966); and reasonable suspicion for stopping a car or probable cause for a warrantless search of that car. This case concerns involuntariness of a defendant's statements, which unavoidably is a much more subjective ultimate issue. The usual reasons for *de novo* review – an appellate

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[4] *Thompson v. Keohane*, 116 S.Ct. 457 (1995), and *Ornelas v. United States*, No. 95-5257 (cert. granted Nov. 6, 1995) (argued March 26, 1996).

court's equal or greater advantage in deciding the issue, and consistency in future similar cases – apply less forcefully to more fact-bound, subjective conclusions than to objective analyses.

And third, *de novo* review of voluntariness of confessions arguably would be asynchronous with the rule that juries may be left that issue to decide notwithstanding a judge's initial determination of admissibility. *Jackson v. Denno*, 378 U.S. 368, 376-91 (1964); *Wilson v. United States*, 162 U.S. 613, 624 (1896); 18 U.S.C. § 3501(a). Outside the setting of the First Amendment, there are few issues left to jury determination that also get *de novo* review on appeal. Respondent addresses each of these reasons for plenary review in order.

First Reason for Plenary Review. In *Miller v. Fenton*, this Court held that the presumption of correctness under 28 U.S.C. § 2254(d) does not apply on habeas review to state court findings that confessions were voluntary. *Miller*, 474 U.S. at 112. Instead, voluntariness of confessions is a matter for "independent federal determination." *Id.*; *see also id.* at 110, 112, 115 ("independent federal consideration," "plenary federal review," and "independent consideration"). Narrowly speaking, the decision in *Miller* may have addressed only the role of federal district courts on collateral review of state court judgments, not even necessarily the role of federal appellate courts in that process of collateral review. After all, § 2254(d) speaks to evidentiary hearings in federal court, and has its primary application in federal district courts.[5]

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[5] Respondent hastens to add, though, that the remand order in *Miller* left the court of appeals free to conduct its own

Regardless of its reach in § 2254 cases, *Miller* certainly did not resolve the proper standard of review for voluntariness determinations on direct appeal of federal criminal cases. In such cases, an independent federal determination of the voluntariness of a statement is the predicate of the appeal, for it is a federal district court that decided the matter in the first instance. On its terms, *Miller* reaches no farther than that predicate: it requires just an independent federal determination of voluntariness. While the United States may wish the reasoning of *Miller* extended to direct appellate review in federal prosecutions, that in truth *would be* an extension, not the sort of foregone conclusion that might render summary disposition appropriate here.[6]

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independent evaluation, *Miller*, 474 U.S. at 118, and on remand the Third Circuit in fact decided the voluntariness issue itself under a "plenary standard of review," without further remand to the district court. *Miller v. Fenton*, 796 F.2d 598, 613 (3d Cir.), *cert. denied*, 479 U.S. 989 (1986).

[6] Right or wrong, the Seventh Circuit's decision in *United States v. Baldwin*, which adopted the standard of review in dispute, was not rash or without precursors. For seven years before *Baldwin*, that court openly raised fair questions about the proper standard of review for voluntariness of confessions. *See, e.g., Sotelo v. Indiana State Prison*, 850 F.2d 1244, 1253-55 (7th Cir. 1988) (Easterbrook, J., concurring); *United States v. Rodriguez*, 888 F.2d 519, 522 n.1 (7th Cir. 1989); *United States v. Rutledge*, 900 F.2d 1127, 1128-29 (7th Cir.), *cert. denied*, 498 U.S. 875 (1990); *United States v. Wildes*, 910 F.2d 1484, 1485-86 (7th Cir. 1990); *Johnson v. Trigg*, 28 F.3d 639, 645 (7th Cir. 1994). The proper interpretation of *Miller* in this context is one of the issues the Seventh Circuit wrestled with in *Rutledge*, 900 F.2d at 1128-29, and again in *Baldwin*, 60 F.3d at 364. That court is not fairly subject to criticism for being too doctrinaire in this area, either: for instance, before *Thompson* it correctly anticipated that

While the United States contends that this Court has applied the *Miller* standard of independent determination both on direct review of state court prosecutions and on appeal in federal cases, the Court never has held that federal appellate courts are to give *de novo* review to federal district courts' voluntariness determinations on direct appeal, or even squarely addressed the issue. *Miller* itself only disavowed any difference between standards on direct and collateral review of state court judgments. *Miller*, 474 U.S. at 110-11. That is not surprising: the rationale that federal courts have final responsibility for ensuring compliance with the federal constitution leads straight to that conclusion. Neither is it surprising that this Court has undertaken independent review on direct appeal from state courts, because this Court is, and has been, the only federal tribunal with any direct appellate (or direct discretionary) jurisdiction over state courts. 28 U.S.C. § 1257(a).[7]

Looking beyond the confession cases, nothing in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), dictates that this Court logically now must direct

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custody in the *Miranda* setting should be given *de novo* review on appeal. *United States v. Menzer*, 29 F.3d 1223, 1230 (7th Cir.), *cert. denied*, 115 S.Ct. 515 (1994).

[7] The comment on an independent determination of voluntariness in *Beckwith v. United States*, 425 U.S. 341, 347-48 (1976), is dictum – the court of appeals had found no coercion, and the defendant abjured any claim of coercion in this Court. *Beckwith*, 425 U.S. at 344 n.4, 348. In any event, *Beckwith* merely quotes briefly a decision that reached this Court on habeas review of a state court judgment, *Davis v. North Carolina*, 384 U.S. 737 (1966).

the federal appellate courts to give *de novo* consideration to district court findings on the voluntariness of confessions. The Court held in *Bose Corp.* that the clearly-erroneous standard of Fed. R. Civ. P. 52(a) does not apply to an appellate court's review of an actual malice finding in a case governed by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); instead, federal appellate courts are to exercise independent judgment on that "constitutional fact." *Bose Corp.*, 466 U.S. at 514, 508 n.27; *see also id.* at 517 (Rehnquist, J., dissenting).

Here, the United States quotes an isolated passage from the majority opinion in which the *Bose Corp.* Court noted that it will apply the same scrutiny to federal court findings of actual malice as to similar state court findings, notwithstanding the fact that Rule 52(a) does not apply on review of state court judgments. In that context, the Court said, "surely it would pervert the concept of federalism for this Court to lay claim to a broader power of review over state-court judgments than it exercises in reviewing the judgments of intermediate federal courts." *Id.* at 499; *see* Petition for a Writ of Certiorari at 18.

But of course, this case does not concern the extent of the Court's *power* to review federal court judgments; respondent may concede that such power is at least coextensive with the Court's power to review state court judgments, if not broader. This case concerns instead the *use* of that power, a proper exercise of which includes allocating tasks among the strata of the federal judiciary.

Bose Corp. is a close and engaging case, one "in which two well-settled and respected rules of law point[ed] in opposite directions." *Bose Corp.*, 466 U.S. at 498. Both

sides in this dispute some day may look to the various opinions in that case for help on the merits. For example, in *Bose Corp.* the Court's conclusion that federal appellate courts have an essential independent function in reviewing actual malice resulted in part from the special concern that factfinders – juries in particular – may act as well-meaning censors of unpopular speech. *Id.* at 508-511 & 510 n.29.[8] Whether that First Amendment concern applies as well to this Fifth Amendment problem surely is a difficult question. Whatever its role in forming the answer to other cases, though, *Bose Corp.* lends itself not at all to summary disposition of this one.

Finally, even were this Court to extend *Miller v. Fenton* to direct appeal of federal prosecutions, it is not clear how much that would alter the court of appeals' decision. The United States agrees that clear error is the proper standard for reviewing "basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators.' " *Thompson v. Keohane*, 116 S.Ct. 457, 464 (1995), quoting *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963); *see* Petition for a Writ of Certiorari at 14; *see also* Brief for the United States at 17-18, in *Ornelas v. United States*, No. 95-5257. Yet the government's principal illustration of a conclusion that it wants reviewed *de novo* actually is an historical, supporting fact that would be given deference. The district court found that some

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[8] Indeed, there is particular reason to mistrust the majoritarian tendencies of juries in guarding the anti-majoritarian ethic of the First Amendment, though in other constitutional contexts the jury's majoritarian quality is the very reason we repose trust in it.

Center staff members either were enlisted or volunteered to act as law enforcement surrogates in dealing with respondent. App. 30a-31a, quoting the district court. On appeal, the court of appeals recognized that finding for what it was: the result of "[d]ealing with conflicting evidence and, necessarily, with the credibility of witnesses." App. 30a.

Moreover, that district court finding went just to the actions of D.F.'s questioners; it was one step removed from the issue of impact on D.F., and one more from the ultimate conclusion that respondent's will was overborne. That finding was, in short, precisely the sort of "basic, primary, or historical fact[ ]," or "recital of external events," *Thompson*, 116 S.Ct. at 464 (internal quotation marks omitted), that will get deferential review regardless of the outcome of this case. *See also Miller*, 474 U.S. at 112 ("To be sure, subsidiary factual questions, such as whether a drug has the properties of a truth serum . . . or whether in fact the police engaged in the intimidation tactics alleged by the defendant . . . are entitled to the § 2254(d) presumption") (citations omitted).

Second Reason for Plenary Review. This term, the Court twice has addressed the proper standard of review on issues that arise frequently in both state and federal criminal prosecutions. Both of those cases involve objective tests. In *Thompson v. Keohane*, the Court held that a "custody" determination for *Miranda* purposes is not entitled to the § 2254(d) presumption of correctness, and that a federal habeas court is to determine the issue independently. That custody determination turns on how "a reasonable man in the suspect's position would have understood his situation," *Berkemer v. McCarty*, 468 U.S.

420, 442 (1984), under all the circumstances. Similarly, in *Ornelas v. United States*, the Court will decide whether findings of reasonable suspicion to stop an automobile, and probable cause to search it without a warrant, get *de novo* review on appeal. Again, those findings depend on whether a police officer had objectively reasonable suspicion or justification for the stop or search, all things considered. *See United States v. Cortez*, 449 U.S. 411, 417-18 (1981); *Michigan v. Long*, 463 U.S. 1032, 1045-50 (1983); *see generally Beck v. Ohio*, 379 U.S. 89, 91 (1964).

By comparison, the assessment of a confession's voluntariness requires determining whether the statement was secured through governmental intimidation, or instead was the product of a rational intellect and free will. *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960); *Haynes v. Washington*, 373 U.S. 503, 513-14 (1963). Inescapably, this is a more subjective test than those at issue in *Thompson* and *Ornelas*. The issue is not the hypothetical reasonable person; it is the particular person who spoke, and now is prosecuted on the strength of her words.

The more subjective cast to this voluntariness inquiry undermines easy reliance here on the decision in *Thompson*, or a close analogy to *Ornelas*. The arguments in favor of *de novo* review in those cases depended largely on the observations that appellate judges are in as good a position as trial courts to decide what a reasonable person would do, and that applications of an objective test tend to guide future decisions while fact-bound conclusions specific to an individual case do not. In determinations of the voluntariness of confessions, the advantage very well may shift back to the trial court. *Cf. Miller*, 474 U.S. at 114 (distinction between issues of fact and law

sometimes "has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question"). Likewise, with confessions it is not clear that the decision in any one case will have much utility in deciding the next. Even if *Ornelas* is decided in favor of plenary review, then, as was *Thompson* (at least, plenary review by "a federal habeas court"), this case will not become a good candidate for summary disposition on the strength of those decisions.

Respondent does not suggest that *Thompson* and *Ornelas* will have no bearing on this case, or that voluntariness of confessions is an entirely subjective question. The question of voluntariness becomes more complex than that, inherently subjective though it is in large part.

Even after the constitutional privilege against compulsory self-incrimination was applied outside court and to pre-charging events, this Court has continued to look elsewhere in the Fifth Amendment – to the due process clause – in addressing the voluntariness of confessions. *Miller*, 474 U.S. at 110. Were the self-incrimination clause the locus of voluntariness determinations, those always might be very subjective or intrinsic inquiries: was a particular person compelled "to be a witness against himself"? But the due process clause has a wider scope; it comprehends some subjective interest in individuals, sometimes is criticized for accommodating too readily the subjective preferences of judges, and by definition encompasses extrinsic, normative, and objective considerations of what is "due." For example, gauged by due process, torture is a forbidden means of extracting a confession not just because the particular subject does not

withstand it successfully, but because the Court has decided that systemically it ought not be tolerated for anyone. *Brown v. Mississippi*, 297 U.S. 278, 285-86 (1936). Subjective assessment of a particular person, subjective values of judges, widely accepted societal norms, and extrinsic standards objectively defined by Congress, *see, e.g.*, 18 U.S.C. § 242, all conceivably might be found in that due process judgment or cited to support it.

Respondent does suggest that there are at least two filaments running through the Court's cases on the voluntariness of confessions, and that they have not always been reconciled or intertwined; the malleable term "voluntariness" has left room for both to run separately at times.[9] First, there are cases putting certain law enforcement conduct out of due process bounds; in these, the actual effect on the particular person subjected to that conduct usually is almost incidental to the decision. Examples in this line are *Ashcraft v. Tennessee*, 322 U.S.

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[9] The decision in *Colorado v. Connelly*, 479 U.S. 157 (1986), may be read as a step toward reconciliation of these two lines, especially in its holding that some coercive activity by a state actor is a necessary predicate to a finding that a confession is not voluntary within the meaning of the due process clause. *Connelly*, 479 U.S. at 167. By the same token, Justice Stevens' separate opinion in *Connelly* illustrates the possible lack of agreement on a conceptual approach: unlike the Court, he was willing to accept the state trial court's finding that the defendant's statements were "involuntary," but he agreed with the Court that they were admissible all the same "because they were not the product of state compulsion." *Id.* at 172 (Stevens, J., concurring in the judgment in part, dissenting in part). So while the majority sought to define voluntariness, Justice Stevens raised the possibility that the term is not to be defined, and ought to be cast off for something else.

143, 148-53 (1944) (36 hours of continuous, relay interrogation; Court did not even decide whether in fact defendant had confessed at all, which was disputed); *Malinski v. New York*, 324 U.S. 401, 403-10 (1945) (defendant stripped naked in hotel room, later given only socks, shoes, underwear and blanket; held 10 hours, but only occasional questioning; confession not directly introduced, but conviction still denied due process); *Moran v. Burbine*, 475 U.S. 412, 432-33 (1986) ("We do not question that on facts more egregious than those presented here police deception might rise to a level of a due process violation . . . We hold only that, on these facts, the challenged conduct falls short of the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States"); and even *Miller*, 474 U.S. at 109 ("certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned"). While the bounds may not be drawn objectively in the first place, this is both the more objective and the more normative line in the sense that lower courts in subsequent cases may compare new factual settings to the bounds defined and ask whether an ordinary person could (objective), or should have to (normative), withstand similar pressures.

Second, there are cases in which the Court has decided simply that the defendant at issue did not confess freely under the circumstances, that his will was overborne; in those, the law enforcement conduct may escape blanket condemnation, or even much overt criticism. The decisions in *Lynumn v. Illinois*, 372 U.S. 528, 534

(1963) (defendant confessed in her apartment; police conduct limited to telling her that state financial aid for her children would be cut off and her children taken from her if she did not cooperate); *Townsend v. Sain*, 372 U.S. at 308 ("Any questioning by police officers which *in fact* produces a confession which is not the product of a free intellect renders that confession inadmissible;" emphasis in original; not significant that people administering drug with truth serum qualities may not have known of those qualities); *Blackburn v. Alabama*, 361 U.S. at 204, 207-08 (defendant insane; 8-9 hours of police questioning, no evidence of unusually coercive tactics); and *Mincey v. Arizona*, 437 U.S. 385, 396-402 (1978) (defendant's medical condition, response to questions, and incapacitation in hospital bed rendered statements involuntary), represent this line. These cases tend to be the more subjective, in the sense that they resolve only whether one person's "will" was "overborne," and offer little normative or objective guidance to lower courts in subsequent cases, involving different defendants.[10]

Respondent's case clearly is of the second strand. Not in every case, and not as to every defendant, would the

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[10] For an academic analysis that draws some roughly similar distinctions in the Court's confession cases, *see* Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 Stan. L. Rev. 411, 417-20, 429-34 (1954). Another critique of the confession cases, more steeped in the vocabulary of judicial restraint and questioning the Court's voluntariness approach, is Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 Va. L. Rev. 859, 864-68, 896-924 (1979). Professor Grano proposed an objective mental freedom test and a fundamental fairness test to replace voluntariness.

conduct of the mental health center's therapists here necessarily have produced judicial findings of involuntary confessions. Both the district court and the court of appeals looked closely at the individual characteristics of the respondent in reaching the conclusions they did. Her age, history of abuse, mistrust of adults and authority figures, intelligence, and even her isolation as the target of racist graffiti in the locked ward (App. 17a-18a at n.10) all were important factors in the outcome. App. 69a. There is little or no reason to think that appellate courts are better able to make these assessments than district courts.

So the United States concentrates instead on the finding that Center staff acted as law enforcement surrogates in arguing that *de novo* review ought to be the standard. This concentration makes a more appealing argument for that standard, because it suggests something of lasting, objective precedential value, which is a classic reason for preferring plenary consideration by an appellate court. But that concentration also miscasts this case on the whole, and overlooks the many other voluntariness cases in the second line that are peculiar to their individual settings and provide little or no assistance in deciding the next case.

Resolving the standard of review for the voluntariness of statements, then, will require the Court to consider closely what the rubric of voluntariness means in this setting, and to bring into harmony the two lines of cases that arise under it. That task hardly is adapted to summary disposition, any more than a citation to *Thompson* or to an eventual decision in *Ornelas* will resolve this case summarily.

Third Reason for Plenary Review. Provided the defendant first has a fair opportunity to challenge the voluntariness of her statements out of the jury's presence, a jury may[11] be left to reconsider and decide anew the voluntariness issue. *Jackson v. Denno*, 378 U.S. 368, 376-77, 380, 391 (1964). Although commentators have been critical of a jury role in deciding the voluntariness of confessions, at one time a number of states followed "the Massachusetts procedure," under which the jury passed on voluntariness after the trial judge fully and independently resolved the issue against the accused. *Jackson v. Denno*, 378 U.S. at 378-79 & 378 n.8. Some states still may use that procedure. *See Crane v. Kentucky*, 476 U.S. 683, 688 (1986) ("most, but not all, States assign to the trial judge alone" the resolution of the legal question of voluntariness). Indeed, constitutionally a state may assign a jury the exclusive role of determining voluntariness of a confession, so long as that is not the trial jury. *Jackson v. Denno*, 378 U.S. at 391 n.19.

In federal cases, Congress has decided expressly that, after determining a confession voluntary and admitting it, "the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances." 18 U.S.C.

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[11] There seems no constitutional rule requiring states to permit juries to reevaluate the voluntariness determination, so long as states do permit a defendant to offer otherwise admissible evidence attacking the reliability of the confession even if that evidence overlaps substantially with the evidence used to determine voluntariness. *Crane v. Kentucky*, 476 U.S. 683, 688-91 (1986).

§ 3501(a). That statute's mandatory role for the jury is broader than this Court's approach in *Wilson v. United States*, 162 U.S. 613, 624 (1896), which allowed but did not require federal courts to submit the voluntariness of a confession to the jury after first ruling it admissible.

A role for the jury in passing upon the voluntariness of a defendant's statements is historically grounded, although it may not have been the English practice until the second half of this century. *See* Cross, *Confessions and Cognate Matters: An English View*, 66 Colum. L. Rev. 79, 82-85 (1966) (contending that English law began moving toward allowing juries to determine voluntariness of confessions during the period 1953-63); 3 J. WIGMORE, EVIDENCE § 861, at 570-93 (Chadbourn Rev. 1970). Fully one hundred years ago in *Wilson*, this Court allowed federal juries to be assigned the task of reevaluating the voluntariness of confessions that a federal judge had ruled admissible. And until 1964, many states left the issue entirely to the jury, at least when reasonable people could disagree over a statement's voluntariness. *See Jackson v. Denno*, 378 U.S. at 377; Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury*, 21 U. Chi. L. Rev. 317, 319-39 (1954).

In more recent times, of course, judges have assumed greater responsibility for the task of ruling upon voluntariness, and the Court correspondingly has come to see the issue as more "legal;" in *Crane*, the Court went as far as calling voluntariness a "purely legal question." *Crane*, 476 U.S. at 688.

Whether that description is right, or the description just one year earlier that the issue is a "mixed question of

fact and law," *Miller*, 474 U.S. at 112, is more accurate, there still is much practical truth to the Court's observation of confessions in *Jackson v. Denno* that, "Where pure factual considerations are an important ingredient, which is true in the usual case, appellate review in this Court is, as a practical matter, an inadequate substitute for a full and reliable determination of the voluntariness issue in the trial court and the trial court's determination, pro tanto, takes on an increasing finality." *Jackson v. Denno*, 378 U.S. at 391. Given that densely factual quality of the voluntariness determination, it is little wonder that so many states had left the issue largely or entirely within the jury's realm.

Even today, precisely because the question still is so factually laden, there is an argument[12] that the jury serves as a useful second screen to prevent a guilty verdict from taking root in a coerced confession. Under § 3501(a), that secondary screening function remains one purpose of the federal criminal jury. *See also Lego v. Twomey*, 404 U.S. 477, 486 (1972).

With voluntariness of confessions remaining an issue that federal juries, and those in some states, may decide independently, at a bare minimum it would be unusual for federal appellate courts to undertake *de novo* review

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[12] Professor Meltzer made the contrary argument, contending that the Massachusetts procedure may diminish a judge's sense of responsibility and encourage passing questionable confessions to the jury. Meltzer, *supra*, at 329. Given the practical reluctance of most trial judges to suppress confessions, respondent doubts that much disincentive to suppress really is added by allowing the jury to consider voluntariness.

of such an issue. True, even in federal civil cases, to which the Seventh Amendment speaks, it is not unheard of for appellate courts to review certain jury findings *de novo*; the First Amendment sometimes requires that, this Court has held. *See Bose Corp.*, 466 U.S. at 508-11 and cases discussed there. But it is unusual. For example, trial court or jury findings on negligence, though they enmesh fact with law, generally are reviewed for clear error. *McAllister v. United States*, 348 U.S. 19, 20 (1954); *Thompson*, 116 S.Ct. at 466 n.13.

Likewise, this Court has applied the clear error standard to determinations that something is a "gift" for purposes of the Internal Revenue Code, and explained that conclusion in graceful terms equally commanding here: "Decision of the issue presented in these cases must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case. The nontechnical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each, confirm us in our conclusion that primary weight in this area must be given to the conclusion of the trier of fact." *Commissioner v. Duberstein*, 363 U.S. 278, 298 (1960).[13]

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[13] The disputes consolidated in *Duberstein* did not involve jury trials, but both a taxpayer and the government have a statutory right to a jury trial in such cases. 28 U.S.C. §§ 2402, 1346(a)(1).

In the end, the name assigned the issue of a confession's voluntariness – an issue of law, a mixed question of fact and law, a constitutional fact – may please the pragmatist, who then knows what standard of review will apply. But it is unlikely fully to satisfy the rationalist, who wants to know why logically one label was chosen over another. As the Court has said, this descriptive process "is sometimes as much a matter of allocation as it is of analysis." *Miller*, 474 U.S. at 113-14. Whatever the label, though, voluntariness of confessions is an issue federal juries may reach. The jury's role in deciding the question of a confession's voluntariness has both pragmatic force, lying in its wide adoption, and rational justifications, lying in the fact-bound, nontechnical quality of the question and in the function of backing trial judges with a second defense against improper reliance on a forced statement.

Possibly there are reasons to take the unusual step of reviewing *de novo* this species of jury issue on direct appeal in federal criminal cases. But if so, still it does not follow that the Court should settle on those reasons summarily, without full briefing and consideration of the competing arguments.

CONCLUSION

In respondent's view, there are sufficient reasons to grant a writ of certiorari, but the Court should not summarily reverse the judgment of the court of appeals.

Respectfully submitted,

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April, 1996